Petition

81-948

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

RICHARD B. MENIUS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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North Carolina 27106

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QUESTIONS PRESENTED FOR REVIEW.

1. Whether an IRS decision to selectively prosecute a taxpayer, based on factors of intelligence and educational background of the taxpayer constitutes arbitrary selective prosecution in violation of the equal protection component of the due process clause of the Fifth Amendment.

2. Whether the representation of the defendant in a federal tax prosecution by members of the law firm which also represents the legal interests of the defendant's employer constitutes an actual conflict of interest and breach of the attorney's duty of confidentiality sufficient to justify withdrawal of the defendant's plea of guilty under Federal Rule of Criminal Procedure 32(d), when said attorney blocked defendant's efforts to get other attorneys and coerced defendant to plead guilty while informing defendant's employer of every facet of the case without the knowledge or

consent of defendant and when the attorney collaborates with the employer to avoid adverse effects to the employer resulting from the criminal prosecution.

3. Whether the District Court in praising the practice and competence of petioner's attorneys during hearing reflected partiality sufficient to justify that this case be remanded for a rehearing in the District Court.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The only parties to the proceedings in this case before the Court of Appeals for the Fourth Circuit are the parties listed in the caption for the petition.

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OPINIONS AND ORDERS BELOW

The order of the Fourth Circuit Court of Appeals denying the petition for rehearing is printed as Appendix A, infra.

The per curiam opinion of the Fourth Circuit Court of Appeals is printed as Appendix B, infra, and is an unpublished opinion.

The order of the United States District Court for the Middle District of North Carolina is printed as Appendix C, infra, and is an unpublished order.

JURISDICTION

The opinion of the Fourth Circuit Court of Appeals was entered on July 17, 1981.

The order denying the petition for rehearing was filed September 21, 1981.

Jurisdiction in this Court is invoked persuant to 28 U.S.C. § 1254 (1) and to Rule 17.1, and to 18 U.S.C. § 3772.

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RICHARD B. MENIUS, Petitioner.
vs.
UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fourth Circuit in this proceeding.

STATEMENT OF THE CASE

On the evening of February 5, 1974, petitioner after entertaining employer's customers, tried to accumulate all his tax records for subject year 1972 to take to the IRS the next day. A record of contributions and work for the family's church opening in March 1972 by petitioner's wife was missing. This totaled by affidavits from the church administrator $5,150.00. Petitioner's deduction was only about $2,000 and that personal record was missing. Petitioner, ill with a viral flu, a temperature of 102°, taking twice the normal dosage of Contax and having had several alcoholic drinks (all verified by sworn affidavits) apparently changed the amount on three checks, one which was his wife's, although he does not remember doing so. One of the checks changed was a $4.00 check changed to $14.00, an incredible and rediculous act that a banker of 36 years would do when if there were intent to do wrong there were many ways to cover up

such acts that could never be detected.

On April 20, 1976 the petitioner, Richard B. Menius (hereinafter referred to as the petitioner) was charged in a one count information with submitting a false and fraudulent statement to the Internal Revenue Service on February 6, 1974, to wit: three altered checks relating to itemized deductions claimed on the petitioner's 1972 income tax return, (alleged tax liability, $637.00) in violation of 18 U.S.C. § 1001.

Upon the advice and insistence of his counsel, the petitioner entered a plea of guilty at arraignment before the Honorable Wilson Warlick, Judge presiding in the United States District Court for the Middle District of North Carolina. Judge Warlick conducted a brief hearing, pursuant to Rule 11, F.R. Crim. Proc., and accepted the petitioner's plea on April 20, 1976. The next day, April 21, 1976, Judge Warlick entered judgment of conviction and sentenced

the petitioner to pay a $2,000 fine, which the petitioner paid the following day.

After these proceedings and the conviction, the petitioner was informed by his employer, Wachovia Bank & Trust Co., that he could no longer work for the bank as a senior vice-president, due to the requirements of 12 U.S.C. § 1829. The petitioner was allowed to take early retirement.

Throughout these proceedings and the investigation leading up to them, the petitioner repeatedly expressed dissatisfaction with his attorneys, both members of the firm representing petitioner's employer, by trying to get copies of counsel's file on the case and getting other lawyers.

The petitioner within a few days after conviction learned that his attorneys had been dishonest and misinformed him on many vital issues that petitioner immediately tried to employ counsel to withdraw the plea. Petitioner has talked to 16

attorneys and employed some during the 3½ years in preparing a motion to file. Petitioner's efforts during that time included numerous contacts with the U. S. Attorney, Internal Revenue Service, and the Department of Justice. (See Appendix F) Every attorney consulted assured petitioner that there was an actual rather than a potential conflict of interest but their fees were so high that petitioner has had to proceed on a pay-as-you-go basis.

On May 13, 1980, the petitioner filed in the District Court a motion to withdraw his guilty plea pursuant to Rule 32(d), F.R. Crim. Proc. or in the alternative, a writ of error Coram Nobis, alleging as grounds of relief, inter alia, that his attorneys, while representing him in the criminal matter, were operating under an actual conflict of interest in that as members of the law firm which served as Wachovia Bank's general counsel, they were representing the bank's interests instead of the petitioner's. The petitioner in

his motion also alleged that his attorneys had violated their duty of confidentiality in that they were informing the bank of the status of the investigation at every step and of the petitioner's position on the matter, without the petitioner's knowledge or consent.

On August 5, 1980 the United States (hereafter referred to as the respondent) filed a response to the motion, together with the affidavits of Murray C. Greason, Jr. and Leon L. Rice, Jr., the petitioner's attorneys during the investigation and arraignment proceedings. A supplementary affidavit was filed by the petitioner on September 10, 1980 and an evidentiary hearing was held before the U. S. Magistrate on January 8, 1981.

The petitioner requested at the evidentiary hearing that his affidavits of March 28, 1980 and Sept. 10, 1980 be introduced as evidence and the Magistrate responded by - "What affidavits are you talking about?" The petitioner during

cross examination of Mr. Rice, counsel during petitioner's investigation and prosecution, was restrained by the Magistrate and informed that, "The court is well aware of the practice and competence of both Mr. Greason and Mr. Rice."

Based on the testimony of the witnesses and the petitioner's affidavits, which were entered into the record, the Magistrate filed his findings and recommendations on January 20, 1981 in which he recommended that an order be issued denying the petitioner's motion to withdraw his plea or for a writ of coram nobis.

The Magistrate found as fact that the evidence shows a potential conflict of interest and no actual conflict, but made no findings with respect to the petitioner's claim that he had been arbitrarily singled out for prosecution.

The petitioner filed objections to the recommendations on January 28, 1981,(App.E) supporting petitioner's honesty in affidavits and allegations with results of polygraph

tests, and on February 27, 1981, United States District Judge, Hiram H. Ward issued an order denying the petitioner's motions to withdraw his guilty plea under Rule 32(d) or for a writ of error coram nobis.

The petitioner filed a timely motion for a rehearing on March 9, 1981 (App. G) requesting permission to call witnesses by name from the U. S. Justice Department, Internal Revenue Service and officers of Wachovia Bank that would prove petitioner's allegations, since petitioner had been restrained from calling witnesses for the evidentiary hearing. This request for a rehearing was denied by Judge Ward on March 25, 1981, and the petitioner gave timely notice of appeal in informal brief (App. I) to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed, per curiam, the order of the District Court on July 17, 1981 and denied a petition for a rehearing on

September 21, 1981.

The Magistrate's Findings were timely responded to by petitioner in Appendix E. The Court is requested to review this response and motion for a rehearing Appendix G as part of statement of the case.

REASONS FOR GRANTING THE WRIT

The Supreme Court should expand the holding in Oyler v. Boles to include intelligence and educational background as arbitrary factors upon which to base a selective prosecution for income tax fraud.

In Oyler v. Boles, 368 U.S. 448 (1962), this court pronounced that selective prosecution of crimes violates the equal protection component of the Due Process Clause of the Fifth Amendment when such selectivity is "deliberately based upon an unjustified standard such as race, religion, or other arbitrary classification. "Oyler, Supra, 368 U.S. at 456. Since Oyler, it has also been held at the federal level

that selective prosecution, when based on the defendant's assertion of a protected right, is unconstitutional . . . Eg., United States v. Choate,619 F.2d 21 (9th Cir. 1980); United States v. Duncan, 598 F.2d 839 (4th Cir. 1979), cert denied _____U. S. _____, 100 S. Ct. 148 (1980). But despite the considerable volume of federal litigation concerning the validity of selective prosecution, not one Court of Appeals has elucidated which factors, other than race, religion, or exercise of a protected right, should be considered arbitrary or unjustifiable. Indeed, the disposition of cases involving the question has been in every instance a restatement of Oyler. See e.g., United States v. Choate, Supra; United States v. Lichenstein, 610 F.2d,1272 (5th Cir. 1980); United States v. Aleman, 609 F.2d, 298 (7th Cir. 1979), cert denied, _____U. S. _____, 100 S. Ct. 1345 (1980); U. S. v Duncan, Supra; U. S. v Neary, 552 F.2d, 1184, (7th Cir. 1977), cert denied, 434 U. S. 864 (1978).

The negative approach taken by the various courts of appeal regarding the question of selective prosecution indicate that while the courts may have an idea which factors constitute justifiable standards upon which to base a prosecution which is otherwise selective, these same courts do not know which factors are unjustifiable under the circumstances. For this reason, it is crucial that this Court set down definitive guidelines relating to factors other than race, religion or exercise of protected rights.

The petitioner submits that there are two factors which should be included under the Oyler standard, within the context of federal prosecutions for violation of 18 U.S.C. § 1001 and 26 U.S.C. § 7207. These factors are intelligence and educational background. Both statutes make it a crime to submit to the Internal Revenue Service false or fraudulent documents, (one a Felony, the other a Misdemeanor).

Intelligence of a taxpayer is a factor which may lead some to conclude that the taxpayer "should have known better" when he violates the tax laws. But our law assumes that all violators should know better than to violate the law, regardless of intelligence. With the exception of minors and those persons determined to be non compos mentis, it is presumed that all adults know better than to violate the law, regardless of their particular level of intelligence. Moreover, basing a decision to prosecute on a person's intelligence has no relationship to the deterrence value of selective prosecution, thus it is an arbitrary consideration.

One's intelligence does not establish any particular proclivity to commit tax fraud. While a person's intelligence may have some relationship to his ability to understand tax laws and to avoid mistakes in filing his returns, it has no relationship to a conscious, willful effort to

cheat the government out of tax dollars. Intelligence, by itself, is not a motivating factor behind a desire to commit tax fraud. If it were, we could claim that the more intelligent a person is, the more likely he is to commit tax fraud. Such a conclusion is belied by the millions of intelligent citizens who would never consider defrauding the government out of taxes legitimately owed to it.

Since intelligence has nothing to do with a likelihood of committing tax fraud, it is irrational to choose intelligence as a factor upon which to base the decision to prosecute. Moreover, prosecution based on intelligence has no real deterrence value. Deterrence is necessary only against those whose only reason for not committing a crime is the fear of prosecution. This group undoubtedly contains people of widely divergent intelligences, so intelligence, by itself, is not reasonably related to the deterrence value of prosecution.

Finally, even if we assume that the more

visible a suspect is to others in the community, the more likely his prosecution will deter others from acting similarly, the intelligence of that person is an irrelevant consideration. Intelligence is not a touchstone whereby position in the community is gauged; it does not determine a person's popularity or his visibility with others in his community. Therefore, it cannot be used as a factor for prosecution when primary purpose of prosecution is to deter similar acts by others. To so use it is arbitrary.

Similarly, educational background is an inappropriate, arbitrary standard for prosecution. Again, the justification for using education as a standard is that the more educated a person is, the more he should have known not to violate the law. But this rationale, as with intelligence, ignores the presumption in our law that all competent citizens are presumed to know better, regardless of their educational backgrounds.

As with intelligence, education does not produce a proclivity to violate the tax laws, nor does it have any particular deterrence value in itself. Those who need to be deterred include the illiterate as well as the educated, so directing prosecution at those with extensive education does nothing to deter those without education. Indeed, the use of educational background as a factor in influencing the decision to prosecute discriminates against those who have taken advantage of their opportunities to escape the trappings of illiteracy and ignorance. While the educated man has no right to expect any more leniency for his transgressions than the man with little or no education, he does have the right not to be singled out for prosecution because of his education, while the less educated man goes free.

Education, while not a fundamental right, San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), is important enough that it may not be

used as a criterion for prosecution under the tax laws. In essence, the use of education as a criterion for prosecution subjects the educated man to a risk that the uneducated or less-educated man need not worry about, even though both may have committed the same offense. This inequality is based on a characteristic having no relationship whatsoever with the nature or seriousness of the offense, nor with the government's interest in deterrence.

The arbitrary nature of these factors is further enhanced in the case at bar where there is an indication that this case did not rise to the minimum dollar amount used by the I.R.S. at that time of $1,000 (now reported as $2,500) as a threshold below which prosecution is not deemed justified.

Unfortunately, a conflict exists in the evidence presented on the I.R.S. policy of prosecuting only those cases above a minimum dollar amount. This conflict was resolved neither by the Magistrate nor the District

Court below. Therefore, this issue should be remanded for a hearing in the District Court.

If it is determined that the petitioner was singled out for prosecution based on impermissible criteria, then it would be manifestly unjust for his convictuon to stand and relief under Rule 32(d) would be appropriate.

The Magistrate's Findings unfortunately, while voluminious, are repetitive and do not give credit to fact that affidavits of petitioner's former attorneys were conflicting, and did not contest many of petitioners allegations. The Magistrate's Findings state so many things as fact that are so erroneous, misleading and no basis of fact that it is incredible and obviously every effort was being exerted to discredit petitioner and take any means necessary to justify a denial of petitioner's motion to withdraw the plea. He gave no weight to the fact that Attorney Rice under oath was

not telling the truth. The Magistrate agreed that it was proper that petitioner's attorneys were constantly keeping petitioner's employer informed (a breach of confidentiality) while telling petitioner that the investigation was a "piddling one" and not to tell employer and that petitioner would be the first to tell employer if it ever became necessary. The Magistrate ignored the fact that counsel under oath admitted that case was handled from an administrative standpoint, rather than criminal. The Magistrate failed to address many things in the petitioner's behalf such as the tapping of petitioner's phone at home and the office during the investigation. For the Magistrate to cut the petitioner off from cross-examining Mr. Rice at the hearing with the statement: "The Court is well aware of the practice and the competence of both Mr. Greason and Mr. Rice", and deny petitioner a hearing with witnesses as requested in Appendix G creates a serious

cloud over whether petitioner received competent counsel and a fair hearing in District Court. The Fifth Amendment protects a person against arbitrary and capricious acts of government and due process of law.

If it is determined that petitioner has been deprived of his rights under the Fifth Amendment without due process of law and against arbitrary and capricious acts of government then it would be manifestly unjust for his conviction to stand and relief under Rule 32(d) would be appropriate.

CONCLUSION

The petitioner apologizes and expresses regrets to the Court for the necessity of this pro se petition. It is the only honest and truthful, law abiding way that petitioner has to get help to correct an injustice.

For the reasons stated above, the petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted,

Richard B. Menius, pro se
966 Kenleigh Circle
Winston-Salem, N. C. 27106

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-6335

United States of America, Appellee.

v.

Richard B. Menius, Appellant.

O R D E R

Upon consideration of the appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Hall for a panel consisting of Judge Hall, Judge Phippips, and Judge Murnaghan.

For the Court,

/s/William K. Slate,II

CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-6335

United States of America, Appellee.

v.

Richard B. Menius, Appellant.

- - - - -

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Hiram H. Ward, District Judge.

- - - - -

Submitted: May 29, 1981
Decided: July 17, 1981

- - - - -

Before HALL, PHILLIPS, and MURNAGHAN, Circuit Judge.

- - - - -

(Richard B. Menius, Appellant Pro Se. N. Carlton Tilley, Jr., Assistant United States Attorney, for the Appellee.)

APPENDIX B-1

PER CURIAM:

A review of the record and the district court's opinion accepting the magistrate's recommendation discloses that this appeal from its order denying relief under Rule 32(d), Fed. R. Crim. P., and other post-conviction relief is without merit. Because the facts and legal arguments are adequately presented in the record and other materials before this Court and the decisional process would not be significantly aided by oral argument, we dispense with oral argument and affirm on the reasoning of the district court. United States v. Menius, C/A No. Cr-76-104-01-G (M.D. N.C., Feb. 27, 1981.

AFFIRMED

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

UNITED STATES OF AMERICA:
v. : Cr-76-104-01-G
RICHARD B. MENIUS :

O R D E R

On January 20, 1981, the United States Magistrate's Findings and Recommendations were filed and notice was served on the parties pursuant to 28 U.S.C. § 636(b) and a copy was given to the Court.

Within the time limitations set forth in the statute, defendant objected to the Findings and Recommendation.

The Court has reviewed the file and transcripts of the proceedings and finds that the objections do not change the substance of the Magistrate's Findings and Recommendations, which are hereby adopted.

IT IS THEREFORE ORDERED that Defendant's motions to withdraw his plea under Rule 32(d) or for a writ of error coram nobis be and is hereby DENIED.

s/Hiram H. Ward
United States District Judge

February 27, 1981.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Cr-76-104-01-G
	)	
RICHARD B. MENIUS	)	

MAGISTRATE'S FINDINGS AND RECOMMENDATIONS

Richard B. Menius, defendant, was convicted on his guilty plea of violating 18 U.S.C. § 1001 on April 20, 1976. He was fined $2,000.00, and has paid that fine. He now appears before the Court moving either to withdraw his plea under Rule 32(d), Federal Rules of Criminal Procedure, or for a writ of error coram nobis. He raises four arguments for relief, each based in some perceived error or misdeed on the part of his lawyers. On the basis of the materials in the record and after an evidentiary hearing on one question presented by the case, the Court concludes that relief is not warranted and the motion

should be denied.

FACTS[1]

I. Menius was asked to appear before the Internal Revenue Service (IRS) on February 6, 1974, for an audit of his 1972 income tax return. The night before the audit, Menius had a viral infection, for which he had been taking antihistimines, and he was intoxicated. That evening he altered three conceled charitable donation checks from 1972.

The next day, Menius, no longer drunk, but "disoriented and mentally impaired because of his illness, "took his tax records to the IRS office in Greensboro. He failed "in his attempts" to point out the altered checks to the auditor "due to the rush to close" the office. The audit was not complete on February 6, and the auditor told Menius it would remain open while she checked some of his charitable deductions.

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[1]The following facts are drawn from Menius's affidavits, briefs and motions, along with the uncontradicted portions of affidavits submitted by Leon L. Rice, Jr., and Murray C. Greason, Jr.

The next contact Menius had with the IRS concerning his checks was on March 25, 1974, more than six weeks after he first altered the checks. Two IRS officials visited him and asked that he produce the altered checks. He did so and explained that he had altered them.

That afternoon Menius was contacted by Ralph Fraiser, in-house counsel for Wachovia Bank & Trust Company, Menius' employer. Fraiser told Menius that the IRS had suppoeaned some of the Bank's financial information about him and urged that he hire lawyers if he had not already. Despite some misgivings, Menius hired Murray C. Greason, Jr., of Womble, Carlyle, Sandridge & Rice. The Womble firm, which Fraiser had recommended, is also general counsel to Wachovia.

Greason and Leon L. Rice, Jr., who is a partner in the same firm, met often with Menius. They traveled to Atlanta and

Washington during 1975 to attempt to persuade the IRS to drop prosecution. After an information was filed against Menius, the lawyers advised him to plead guilty.

Throughout the time leading up to his arraignment and sentencing, Menius expressed dissatisfaction both with the idea of having lawyers and with his two counsel. A week before his scheduled arraignment and trial, Menius told his lawyers that he no longer desired their services, but he changed his mind later, and Rice accompanied him to his arraignment and trial.

He pleaded guilty before United States District Judge Wilson Warlick, and after a brief hearing, he was sentenced to pay a $2,000.00 fine. He has paid the fine. After his conviction, Wachovia informed him that he could no longer work for the bank, due to 12 U.S.C. § 1829. That section of the Federal Deposit Insurance

Corporation chapter provides:

> Except with the written consent of the Corporation, no person shall serve as a director, officer, or employee of an insured bank who has been convicted, or who is hereafter convicted, of any criminal offense involving dishonesty or a breach of trust.

Menius had been a senior vice president with the Bank. He was permitted to take early retirement, and he continues to draw a pension equal to about half of his former salary.

In his motion to withdraw the plea or for writ of error coram nobis, Menius alleges essentially four reasons for relief: (1) counsel did not fully advise him of the consequences of a guilty plea; (2) counsel coerced his plea, particularly by threatening to resign; (3) counsel operated under a conflict of interest; and (4) counsel were incompetent.

II. General Legal Considerations.

Before considering Menius' two motions, some difficulties in this particular case should be mentioned. First, Menius has delayed filing the motions for four years. While his affidavit shows that he has been busy writing letters, etc., the passage of

four years necessarily limits the recollection of witnesses, the availability of witnesses and documents, and the United States Attorney's ability to reprosecute this case, should defendant's motions be granted. In Raines v. United States, 423 F.2d 526, 531 (4th Cir. 1970), the Court held that delays in filing a federal habeas corpus petition--one of 28 months, another of nine years--should be considered as factors limiting the credibility of petitioner's representations. See Stokes v. United States, 366 F.Supp. 879, 880 (D.Md. 1973) (delay of four years was "strange" and should be considered).

Secondly, at trial the Court conducted a full Rule 11 inquiry into the plea, concluding that it was voluntary, intelligent and factually sound. A movant seeking to withdraw his plea must overcome a strong presumption in favor of that finding. "Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions

that in the face of the record are wholly incredible." Blackledge v. Allison, 431 U. S. 63, 74 (1977); Jones v. Taylor, 547 F. 2d 808, 810 (4th Cir. 1977).

Finally, Menius' own filings show beyond doubt that he was guilty of the crime to which he plead guilty. He plead guilty to 18 U.S.C. § 1001, which reads:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully falsifies, conceals or covers up any trick, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The Second Circuit construed the statute in United States v. McCue, 301 F. 2d 452, 454, cert. denied, 370 U. S. 939 (1962), to include four elements:

> The elements of the offense are (1) a statement, (2) falsity, (3) that the false statement be made 'knowingly and willfully', and (4) that the false statement be made in a 'matter within the jurisdiction of any department or agency of the United States.'

The only element in that list which could be questioned in this case is whether Menius'

deceptions were "knowing and willful." Assuming that Menius was, as he states, intoxicated on the night he altered the checks beyond the ability to have the requisite intent, defendant must still answer for the fact that he presented the altered checks to the IRS auditor on February 6, 1974 and remained silent about their alteration for six weeks following that submission.

The Fifth Circuit in United States v Lance, 528 F.2d 1280, 1288 (5th Cir. 1976), explained the nature of intent required by this statute:

> A violation of § 1001 requires proof that the defendant had the specific intent to make a false or fraudulent statement, cf. United States v. Markee, 425 F.2d 1043, 1046 (9th Cir.), cert. denied, 400 U. S. 847 (1970). The misrepresentation must have been made deliberately, United States v. Mekjian, 505 F.2d 1320, 1324 (5th Cir. 1975), knowingly and wilfully, United States v. Smith, (523 F.2d 771 (5th Cir. 1975), or at least with reckless disregard of the truth and with a conscious purpose to avoid learning the truth. See United States v. Egenberg, 441 F.2d 441, 444 (2nd Cir.), cert. denied, 404 U. S. 994 (1971).....

Reading Menius' submissions generously,

one might conclude that he was too intoxicated on the night he altered the checks to have the proper intent to violate § 1001. However, his only claim with respect to the day he submitted the checks is that he was "disoriented." Moreover, he does not claim any mental or physical impairment during the six weeks while the audit was technically open. He cannot claim ignorance of the alterations, since his affidavit recites that on the date of the audit he made unsuccessful "attempts to inform the Internal Revenue Service auditor about the alterations on the three checks."

The statute permits a conviction based on intentional and knowing falsehood, despite a defendant's ignorance that his statement was made to a federal entity. United States v. Baker, 626 F.2d 512, 516 (5th Cir. 1980). It permits a conviction despite a defendant's ignorance of falsehood, when that ignorance is reckless or intentional. United States v. Restrepo-

Granda, 575 F.2d 524, 529 (5th Cir.), cert denied, 439 U.S. 935 (1978); United States v. Evans, 559 F.2d 244, 246 (5th Cir.), cert. denied, 434 U.S. 1015 (1978). A defendant may be exculpated from his false submission only when he shows that it was offered through mistake, accident or some other "innocent reason." United States v. Cook, 586 F.2d 572, 579 (5th Cir. 1978), cert denied, 442 U. S. 909 (1979); see Mathes, Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 39, 77 (1960). Surely, therefore, in the absence of some adequate innocent explanation, Menius' submission of the false checks and his continued silence during the six weeks audit violated § 1001 beyond a reasonable doubt. See United States v. Lozano, 511 F.2d 1, 4 (7th Cir.), cert. denied, 423 U. S. 850 (1975).

Thus, Menius must show unusually good reason for his motion, given his failure to make the motion for four years, the trial Court's full Rule 11 inquiry, his

sworn explanation of how the checks came to be altered--see especially pages 13 and 14 of the transcript of the April 21, 1976 hearing--and the fact that his own submissions in this case establish his guilt of the offense charged beyond reasonable doubt.

III. Menius' Rule 32(d) Motion.

The general law respecting Rule 32(d) motions after conviction is stated in United States v. Roland, 318 F.2d 406, 409 (4th Cir. 1963):

> Under Rule 32 of the Federal Rules of Criminal Procedure, a motion to withdraw a plea of guilty may ordinarily be made only before sentence is imposed or while imposition of sentence is suspended. Such motions before sentence should be allowed the great liberality, but after judgment and the imposition of the sentence, the Rule gives the Court the power to grant such a motion if such action appears to be necessary 'to correct manifest injustice.' A motion to withdraw a plea which should be allowable asof course, or almost so, before judgment and the imposition of sentence, is allowable after sentence has been imposed only in extraordinary cases, and then the District Judge has a substantial discretion in making a determination of the requirements of justice.

See United States v. Semel, 347 F.2d 228, 229 (4th Cir.), cert. denied, 382 U.S. 840

(1965). The Ninth Circuit explained the reason for limiting plea withdrawals after conviction to cases of "manifest injustice" in Kadwell v. United States, 315 F.2d 667, 670 (9th Cir. 1963):

> (W)ithdrawal of a guilty plea after sentence is conditioned by Rule 32(d) upon a showing of 'manifest injustice.' This distinction rests upon practical considerations important to the proper administration of justice. Before sentencing, the inconvenience to court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury. But if a plea of guilty could be retracted with ease after sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence was unexpectedly severe. The result would be to undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentencing process.

Is this action an "extraordinary case" in which withdrawal of the defendant's plea is required to avoid "manifest injustice?" It is not.

First, Menius cannot claim "manifest injustice" resulted from his guilty plea, because his own submissions show that the plea was accurate; he was guilty of the

offense. Courts in this Circuit have consistently held that "Under Rule 32(d) a failure to demonstrate innocence, or an admission of guilty, has ordinarily been considered fatal." 8A Moore's Federal Practice 32.07(4). See, e.g., United States v. Roland, supra at 410.

In Sims v. United States, 272 F. Supp. 577, 602 (D.Md. 1966), affirmed, 382 F.2d. 294 (4th Cir. 1967), cert. denied, 390 U.S. 961 (1968), Judge Winter considered a similar case:

> Petitioner here makes no claim of innocence. Unlike the Second and District of Columbia Circuits,...this Circuit has not yet required an allegation of innocence as a prerequisite to a defendant's claiming relief under Rule 32(d). This Court does not now impose one, but in exercising the discretion vested in it by Rule 32(d), this Court cannot be aware that, knowing all of the factors which he now claims entitle him to relief, except misadvice as to the penalty for conspiracy which this Court concludes provides no basis for relief, petitioner freely and voluntarily testified in the tiral of his codefendant Smith and exhaustively admitted his guilt. To permit petitioner, under such circumstances, to withdraw his plea of guilty would convert justice into a game and permit petitioner, none of whose rights were violated, to toy with the time, energy and sanctity of the judicial process.

The result is, of course, simple common sense. A defendant whose own admissions establish his guilt cannot claim that manifest injustice would result from allowing his plea of guilty to stand. Pleading guilty to a crime which one did in fact commit is manifest justice. Therefore, Menius should not be permitted to withdraw his guilty plea.

A second and independent reason to deny Menius' Rule 32(d) motion is that he has waited four years to file the motion. As a result the Court may judicially notice that the government's case has been seriously prejudiced. Rule 32 liberally permits plea changes before sentencing, but even then, prejudice to the government's case may outweigh a defendant's right to plead not guilty. When the government's case has been prejudiced, the Fourth Circuit held in United States v. Tabory, 462 F.2d 352, 354 (4th Cir. 1972), "the trial court must weigh the defendant's reasons for seeking to withdraw his plea against the prejudice which the government will suffer." See United

States v. Truglio, 493 F.2d 574, 578 (4th Cir. 1974). Clearly the passage of four years would greatly limit the ability of the government to reassemble the case against Menius.

Lapse of time has justified denial of Rule 32(d) relief after sentence in several cases. In United States v. Chinn, 74 F. Supp. 189, 191 (D.W.Va.), affirmed, 163 F. 2d 876 (4th Cir. 1947), the Court held that three year's delay in moving to withdraw a guilty plea was simply too much. In Deese v. United States, 303 F. Supp. 619, 626 (D.Md. 1969), the Court held that ten year's delay was "strong and persuasive" evidence against the good faith of the motion. See also Lipscomb v. United States, 226 F.2d 812, 815-16(8th Cir. 1955), cert. denied, 350 U. S. 971 (1956), overruled on other grounds, Lipscomb v. United States, 298 F.2d 9 (8th Cir.), cert. denied,369 U.S. 853 (1962); Oksanen v. United States, 362 F.2d 74, 79 (8th Cir. 1966)(allowing withdrawal after 10 years "would in effect be allowing appellant to free himself of guilt").

Therefore, Menius' motion is untimely and should be denied.

Menius makes several allegations concerning his lawyers, arguing that their representation was bad enough to justify relief for him either under the "manifest injustice" standard of Rule 32(d), or under the standard appropriate for issuance of a writ of error coram nobis. Generally, the standard of "manifest injustice" "permits the judge a greater latitude than the requirements of constitutional "due Process." Pilkington v. United States, 315 F. 2d 204, 209 (4rh Cir. 1963); United States v. Kent, 397 F. 2d 446, 448, n. 1 (7th Cir. 1968), cert denied, 393 U. S. 1081 (1969). However, Rule 32(d) may be more stringent in certain circumstances, as noted above. 8A Moore's Federal Practice 32.07(4); United States v. Dabdoub-Diaz, 599 F.2d 96, 99 (5th Cir.), cert denied, 444 U. S. 878 (1979). Since Menius has admitted his guilt and has delayed filing his motion for four years, his motion for Rule 32(d) relief should have been dismissed as a matter of law without

a hearing. See United States v. Fournier, 594 F. 2d 276, 279 (1st Cir. 1979).

IV. Writ of Error Coram Nobis.

A. Preliminary Matters--coram nobis or § 2255?

The extraordinary writ of coram nobis existed at commonlaw to correct errors of fact underlying civil and criminal judgements, United States V. Morgan, 346 U.S. 502, 507-11 (1954). Rule 60(b) of the Federal Rules of Civil Procedure declares that "Writs of coram nobis . . . are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." The same year Rule 60(b) went into effect, Congress enacted 28 U.S.C. § 2255, which, according to the Reviser's Note, "clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis." See United States v. Hayman, 342 U. S. 205, 216-17 (1952). However, § 2255 explicitly applies only to persons "in custody under sentence of a Court established by Act of Congress, "while a writ of error coram nobis

had applied to anybody challenging his old conviction, regardless of custody. Therefore, § 2255 was conspicuously narrower in scope than coram nobis. See United States v. Lawrenson, 298 F.2d 880 (4th Cir.),cert. denied, 370 U. S. 913 (1962), Courtney v. United States, 518 F.2d 514 (4th Cir. 19750.

The Supreme Court recognized and rectified this anomaly in United States v. Morgan, supra, by holding that coram nobis is not abolished by Rule 60(b) for criminal cases, id. at 505-06, n.4, and that § 2255 does not obviate the writ in non-custody cases. Id. at 510-11. Since then courts have treated motions for writ of error coram nobis as petitions under § 2255 when it is applicable. Raines v. United States, 423 F.2d 526 (4th Cir. 1970). Likewise, a § 2255 petition may be interpreted as a motion for coram nobis relief when the petitioner is not in custody under the challenged judgment. Mathis v. United States, 246 F. Supp. 116, 118 (E.D.N.C. 1965), reversed on other grounds, 369 F2d 43 (4th Cir. 1966); Mustain v. Pearson,

592 F.2d 1018 (8th Cir. 1979). Therefore, the present status of coram nobis is best summarized as the District of Columbia Circuit did in Laughlin v. United States, 474 F.2d 444, 451 (D.C. Cir. 1972), cert. denied, 412 U. S. 941 (1973): "(A)ny fine, technical distinction between coram nobis and § 2255 may properly be resolved by treating the two as substantially equivalent alternatives where, as here, this can be accomplished without contravening the express terms or doctrines of either procedure."

Whether Menius' pro se motion should be considered as a motion for writ of error coram nobis or a petition under § 2255 depends on whether he is "in custody" within the meaning of that term in habeas corpus jurisprudence. If he is in custody, the motion should be considered as § 2255 petition. If not, it should be taken as denominated. This Circuit has not established a clear dividing line for the custody requirement of § 2255. The United States Supreme Court consideres a person "in custody"

for collateral attacks on convictions when he is released on parole, Jones v. Cunningham, 371 U. S. 236 (1963) or pending incarceration. Peyton v. Rowe, 391 U.S. 54 (1968). The Court of Appeals refuses to "grant relief to a § 2255 petitioner who has completed service of his sentence absent adverse collateral legal consequences." Courtney v. United States, supra at 515. Within the Circuit, a conflict is apparent. Decisions in the Eastern and Western Districts of North Carolina suggest a low threshold for "custody." Walker v. North Carolina, 262 F. Supp. 102 (W.D.N.C. 1966), affirmed, 372 F. 2d 129 (4th Cir.), cert. denied, 338 U. S. 917 (1967)(30 days" sentence, suspended upon compliance with housing code was custody); Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969) (inability to vote, run for office, etc., are "custody" even after sentence is served). Judge Merhige reached an opposing position in United States v. Flanagan, 305 F. Supp. 325 (E.D.Va. 1969)(mere collateral restrictions

on one's civil rights are not custody).

The conflict need not detain this Court, however, for in this case, a motion for a writ of error coram nobis and a § 2255 petition are, in the words of Laughlin v United States, supra, "substantially equivalent alternatives." Since Menius alleges inadequate assistance of counsel, the standard to be applied is the same whether the action goes by one name or another. See Morgan v. United States, 396 F.2d 110, 111 (2nd Cir. 1968); Chresfield v. United States, 381 F. Supp. 301, 304 (E.D.Pa. 1974). Therefore, in discussing Menius's claims, the Court shall simply consider whether he has alleged failure to receive adequate counsel in a constitutional sense. That standard is clear in this Circuit.

A defendant is entitled to representation by counsel whose performance is "within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771 (1970); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977).

cert. denied, 435 U.S. 1011 (1978).

"This standard does not require that representation be flawless, only that all decisions materially affecting defendant's representation be the product of informed judgment, not neglect or ignorance." Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978). To obtain relief, a defendant must show that his counsel committed "gross error." McMann v. Richardson, supra at 772. "A convict generally must establish that his counsel's error was so flagrant that a court can conclude that it resulted from neglect or ignorance rather than from informed, professional deliberation." Marzullo v. Maryland, supra at 544.

If a lawyer's judgment has been exercised, courts should not play Monday-morning quarterback when evaluating the effectiveness of his representation. "Marzullo was not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness." Sallie v. North Carolina, supra at 640.

As the Court stated in Goodson v. United States, 564 F.2d 1071, 1072 (4th Cir. 1977), courts should always be "reluctant to second-guess the tactics of trial lawyers." For example, it is not ineffective assistance when a defendant's lawyer makes the strategic decision to waive a jury trial in favor of trial before the judge who presided at the defendant's first trial and conviction. See Wyatt v. United States, 591 F.2d 260 (4th Cir. 1979).

Under any circumstances, a defendant must show that his counsel's inadequate representation resulted in actual harm to his case, or he will not be entitled to relief. Horne v. Peyton, 356 F.2d 631 (4th Cir.), cert. denied, 385 U.S. 863 (1966); Goodson v. United States, supra at 1072. Given those standards and considering the uncontested facts as revealed in pleadings, affidavits and in testimony during an evidentiary hearing held January 8, 1981, the Court finds that Menius is not entitled to relief through a writ of error

coram nobis.

B. Knowledge of Plea Consequences.

A valid plea of guilty requires that the defendant be told all "the direct consequences of his plea." Wade v. Coiner, 468 F.2d 1059, 1060 (4th Cir. 1972). The Court of Appeals for the Fourth Circuit also holds, however, that ignorance of collateral consequences is not grounds for a writ of habeas corpus. Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364, 1365 (4th Cir.), cert. denied, 414 U. S. 1005 (1973). "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Id. at 1366. Federal courts have held that the consequences of a guilty plea were "collateral" when those consequences included: suspension as a fireman, United States v. Crowley, 529 F.2d 1066, 1072

(3rd Cir.), cert. denied, 425 U.S. 995 (1976); suspension of an auto license, Moore v. Hinton, 513 F.2d 781, 783 (5th Cir. 1975); loss of the right to vote or travel abroad, Meaton v. United States, 328 F.2d 379, 380 (5th Cir. 1964), cert. denied, 380 U.S. 916 (1965); Wadly v. Davis, 445 F.2d 1, 3 (5th Cir. 1971); and potential deportation, Michel v. United States, 507 F.2d 461, 465 (2nd Cir. 1975).

Menius' supplmentary affidavit, filed September 10, 1980 (Pleading Number 12*), clearly shows the nature of his complaint regarding his knowledge of the consequences of his plea. The affidavit states that his counsel misinformed him regarding his right to vote and to keep firearms after his conviction. He says, however, that he was aware that he would lose his job upon his conviction, and he has never contested that he knew the possible penalty for the offense to which he plead guilty. Id. at 9. Therefore, his essential com-

plaint is that he did not know of two collateral consequences attached to his plea. Since the accuracy of counsel's advice on this point is controverted, the Court will assume that Menius' recollection is accurate and he was misinformed. Even if that is true, however, it is not basis for a writ of error coram nobis, for the misadvice only concerns collateral consequences. See Cuthrell v. Director, Patuxent Institution, supra. Therefore, in the light of the full Rule 11 hearing held by Judge Warlick, the Court concludes that Menius' plea was entered with an adequate knowledge of the direct consequences of his plea, and he is not entitled to relief on this ground. See Jones v. Taylor, supra at 810.

C. Coercion.

Menius next alleges that his plea of guilty was coerced by his counsel. Standards for alleging coercion in a collateral attack on a plea are clear. To obtain relief, a defendant must prove that his plea was the product of "promises or

threats which deprive it of the character of a voluntary act. . ." Machibroda v. United States, 368 U. S. 487, 493 (1962). A defendant will not be entitled to relief unless he shows that his will was in fact overborne and his plea was involuntary. Brady v. United States, 397 U. S. 742, 755 (1970), DeFlumer v. Mancusi, 443 F.2d 940, 941 (2nd Cir.),cert. denied, 404 U. S. 914 (1971). Merely being persuaded to comply with counsel's advice will not invalidate a plea. Devers v. California, 422 F.2d 1263,1264 (9th Cir.),cert. denied, 399 U. S. 913 (1970). Moreover, in order to state a basis for overturning a plea, the defendant must allege specific acts which coerced his plea. Brady v. United States, supra at 755; Lovan v. Wingo, 315 F. Supp. 656, 659 (W.D.Ky.), affirmed, 429 F. 2d 1407 (6th Cir. 1970). Menius fails to meet these standards in several ways.

First, Menius alleges only one specific act of coercion. He says that on April 7, 1976, his lawyers threatened to resign if he did not plead guilty. Supplemental

affidavit of Richard B. Menius, p. 14. (Pleading No. 12*.) His affidavit says that the threat came late in time, and that he capitulated in order to avoid irreparable damage to his case. That allegation would state a claim for relief, if the affidavit ended there. However, he goes on to say that he told his lawyers he "wanted free of counsel" on April 12, 1976, and their employment was terminated. The government disputes the details of this account, but even assuming it to be wholly true, it refutes Menius' claim that he was coerced. A threat to resign could only have coercive effect as long as the lawyers were in fact employed by Menius. The minute he discharged them--as it were, "calling their bluff"--a threat to resign was acedemic. By discharging his counsel, Menius set himself free to plead not guilty if he wished. From that point forward, through the April 20-21 hearings, his actions, including the act of accepting continued help from the lawyers, were voluntary, and he cannot be heard to claim coercion.

Menius offers no other example of coercive behavior. While he uses a great deal of colored language, it is the language of persuasion, not coercion. Simply saying that his plea was involuntary without showing any form of coercive behavior is inadequate to justify relief through writ of error coram nobis. See Brady v. United States, supra; Lovan v. Wingo, supra.

Secondly, Judge Warlick conducted a full Rule 11 inquiry on April 20, 1976, and in that inquiry, Menius denies that he was "Persuaded or induced" to enter the guilty plea. He also says he has discussed the case with his lawyers and understood his possible defenses. Judge Warlick was careful to repeat one question:

> THE COURT: Now has anyone, I repeat again, made any promises to you that you would receive a lighter sentence or likely be placed on probation or has anyone threatened or intimidated you in any way in order to get you to enter this plea of guilty?
>
> THE DEFENDANT: No, sir.

Rule 11 is designed to prevent repeated assults on guilty pleas after the fact, and it should be considered the end of the

matter here. Judge Warlick was careful to determine that Menius' plea was voluntary, and given that "assiduous and thorough inquiry," Menius should not be heard to refute his own previous testimony, made under the penalty of perjury.[2] See United States v. Boniface, 601 F. 2d 390, 393 (5th Cir. 1979).

Finally, taken as a whole, the evidence shows that Menius plead guilty because his lawyers persuaded him that it was the wisest thing to do. Nearly all his allegations of coercion are, in the end, couched in the language of persuasion. Counsel "repeatedly and insistently advised defendant that he had no alternative but to plead guilty." Affidavit of Richard B. Menius, p. 3, 16. (Pleading No. 56*.) In his supplemental affidavit, supra, he says he "was advised

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[2]At the Evidentiary hearing, Menius argued that Rice advised him to perjure himself at the Rule 11 hearing. However, mere advice short of coercion is not a satisfactory basis for denying one's previous assertions under oath. See Blackledge v. Allison, supra. Furthermore, upon questioning by counsel and the Court, this testimony by Menius became totally incredible.

to plead guilty," (p.11) "was told . . . the only alternative defendant had was to plead guilty and be at the mercy of the Court," (p. 12) and "was prompted" at the hearing to answer plea questions properly (p. 16). This kind of advice, even if it reached the level of insistence or argument, was clearly proper, given the strong evidence against Menius, including his own admissions proving his guilt. "If the best professional advice that a lawyer can give is to enter a plea of guilty, and the accused relies on his lawyer's expertise, the accused cannot later successfully urge that the plea was involuntary on the basis of counsel coercion." Anderson v. Henderson, 439 F.2d 711, 712 (5th Cir. 1971). A careful reading of the record shows that Menius' lawyers argued that he do the smartest thing--plead guilty--and that he eventually accepted that advice. His claim of coercion is simply regret for making what he now considers a bad choice, and does not provide a basis for relief. "The fact that a defendant may later regret

having followed his attorney's advice is not grounds for relief. . . ." United States v. Kramzthor, 614 F.2d 981, 983 (5th Cir. 1980).

D. Conflict of Interest.

The most serious charge Menius presents is the claim that his counsel worked under a conflict of interest and that their representation was therefore ineffective. The charge is serious, because the evidence shows a potential conflict. His lawyers were members of a large law firm which was general counsel to his employer, Wachovia Bank & Trust Company, at the time. While the affidavits produced by Menius are basically conclusory, the Court found it appropriate to hold an evidentiary hearing to determine whether Menius had evidence of an actual conflict of interest which affected his representation. As a result of that hearing and review of the law on the subject, the Court concludes that Menius has no evidence of any actual conflict, and is not entitled to relief

on this claim.

The most recent guidance on conflicts of interest in criminal representation is Cuyler v. Sullivan, ____U.S._____, 48 U.S.L.W. 4517 (1980). In that case, the Supreme Court considered whether a defendant whose counsel had a potential conflict of interest was thereby automatically entitled to relief from his conviction. The Court held "that the possibility of conflict is insufficient to impugn s criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Id. at 4521. The uncontradicted portions of affidavits submitted by Menius' former lawyers along with other evidence in the file, show that Menius cannot make such a showing.

Menius first argues that the firm of which his lawyers were members was involved in anti-trust litigation involving Wachovia, and this involvement might have led the

lawyers to avoid antagonizing any representative of the Justice Department. The unanswered affidavits of Leon L. Rice, Jr., and Murray C. Greason both state that the law firm was not involved in the antitrust suit at all. Affidavit of Leon L. Rice, Jr., p. 4 (Pleading No. 9*); affidavit of Murray C. Greason, Jr., pp. 9-10 (Pleading No. 9*). Menius has not responded with any evidence to the contrary; therefore, this issue may be concluded against him.

Second on Menius' list of conflicts is the fact that his lawyers' firm represented Wachovia in an employment discrimination suit. However, the Rice and Greason affidavits again state without contradiction that there was no Justice Department involvement in the suit, and therefore Menius has not even alleged a potential conflict of interest there. In any event, both affidavits further state that lead counsel for the discrimination suit was a Washington, D. C. firm, and therefore, Menius' lawyers were never actively in-

volved in the suit. Rice affidavit, supra at 4; Greason affidavit, supra at 10. Once again, there is not even a potential conflict of interest in this allegation.

The third and broadest allegation Menius makes is that his lawyers advised him to plead guilty in order to spare the Bank adverse trial publicity. As Cuyler v. Sullivan, supra, establishes, an actual (not potential) conflict of interest must be established, and real detrimental effects shown in order to merit relief. While Menius' affidavits include a number of conclusory allegations that "it is obvious that counsel was serving two clients," (supplemental affidavit, supra at 5), neither his affidavits, exhibits filed with affidavits, nor his testimony and exhibits filed in an evidentiary hearing show that he had evidence of an actual conflict adversely affecting his case. See Dukes v. Warden, 406 U. S. 250, 257 (1972).

Menius hired Greason and Rice after Ralph Fraiser of the Bank's legal depart-

ment, advised him that the Bank's records concerning him had been suppoeaned. Fraiser recommended Greason and telephoned him for Menius. Menius implies that he knew Greason's firm was general counsel to Wachovia when he hired Greason. If he did know that at the time, he should be held to have waived any conflict of interest. See United States v. Duklewski, 567 F. 2d 255, 257 (4th Cir. 1977). In any event, nothing further in Menius' affidavits shows any involvement with Wachovia in the case again until March 15, 1976, when he met with bank officials to discuss the case. Menius affidavit, supra at 2-3; supplemental affidavit, supra at 5, 12, 14-15.

Aside from his conclusory assertion that counsel were "obviously" serving two clients, Menius was unable to offer any evidence of an actual conflict of interest in an evidentiary hearing held January 8, 1981. The only new material he offered was a letter dated March 17, 1976, requesting membership for him in the American

Association of Retired Persons on behalf of Wachovia and a certificate of membership in the AARP dated March 26, 1976. He argued that those documents showed that Wachovia knew he would retire after he told bank officials of the case against him on March 15, 1976, but before he actually decided (on April 7, 1976) to plead guilty and take early retirement.

The letter might show that Wachovia independently assessed his case and expected him to retire after the March 15 conference. It might show that Wachovia knew more about his case than he himself told the Bank. Menius argues that it shows his lawyers violated their duty of loyalty to him and informed the Bank of his situation regularly. First, such a reading is not logically compelled, but rather comes from making several leaps of faith. Secondly, even if one generously concludes in Menius' favor that his lawyers informed the Bank of his case, the evidence still fails to show that this breach of

confidence adversely affected his case. Pleading guilty was still the most intelligent choice his lawyers could have given him. Since he has no evidence to show that there was actual conflict of interest that adversely affected his representation, Menius is not entitled to relief under the rule of Cuyler v. Sullivan, supra. See Horne v. Peyton, supra; Goodson v. United States, supra.

The lack of evidence for Menius' motion is most noticeable when contrasted with the strength of the evidence to the contrary. Both in affidavits filed with the government's reply and in testimony at the evidentiary hearing, Greason and Rice flatly denied that there was ever any conflict in their representation of Menius and their membership in the firm which was general counsel of Wachovia. The lawyers denied ever telling Wachovia officials about the case until Menius held his March 15, 1976, conference with officials. They both stated that they did all they could to assist their client

Menius, and that any effort to avoid publicity was undertaken for his benefit, not because the Bank would profit.

At the end of a full evidentiary hearing, two facts were clear: First, the government's evidence was strong that there was no conflict of interest and that Greason and Rice represented Menius faithfully throughout their employment. Secondly, Menius could offer no evidence at all to show any actual conflict of interest on the part of his lawyers and no evidence at all to show that the conflicts he asserted actually weakened the representation he received from them. In the absolute absence of such evidence, the Court is required to deny the motion.

E. Incompetence.

Menius' last and weakest claim against his lawyers is that they were not competent. The record, including Menius' own admissions, undisputed portions of the government's affidavits, and undisputed exhibits filed

with those affidavits, shows this contention to be not only false but also frenetically absurd. As noted above, the proper standard to apply in a case like this is to require that the representation received be "within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, supra at 771; Marzullo v. Maryland, supra at 543. The representation need not be flawless, and a court need not question tactical decisions. Sallie v. North Carolina, supra at 640. In short, the court simply asks whether the lawyers involved did the sort of work appropriate to a defense of their client.

Greason and Rice clearly did more than enough to meet this standard. They traveled to Atlanta, Georgia, and Washington, D. C., to try to prevent prosecution of the case. Greason prepared several extensive memoranda of law to defer prosecution. See Greason affidavit, supra, exhibits A,B,C. Through extensive negotiation and persuasion, the lawyers were able to postpone filing of the

information and a hearing on the case until Menius was eligible for early retirement at a portion of his pension. Greason affidavit, supra at 4; Rice affidavit, supra at 5. The lawyers obtained aid from the United States Attorney to have Menius charged by information, rather than by indictment, and to have his hearings before Judge Warlick in Wilkesboro, North Carolina, rather than in Greensboro or Winston-Salem, North Carolina, "in deference to defendant and his family, and in hope of avoiding or at least minimizing publicity, again for the benefit of defendant and family . . "Rice affidavit, supra at 8-9. Rice prepared for the plea hearings and interviewed several witnesses including the Meniuses, Menius' boss, and his pastor. Each of those witnesses testified favorably at his plea hearing. In addition, Rice helped obtain a favorable presentencing report through the United States Office of Probation. Rice affidavit, supra at 9. Finally, in deference to

Menius' apparent dissatisfaction with this representation, the lawyers forgave $3,125.00 of Menius' $6,690.00 bill. Greason affidavit, supra at 3.

Even a cursory review of the record shows that Greason and Rice went far beyond the standard representation in criminal cases for Menius. In the light of that, Menius' argument that his counsel were incompetent is incredible. It certainly does not merit relief.

Menius plead guilty and was sentenced on April 21, 1976. He paid his fine almost immediately. The evidence before the Court shows that since that time, he has incessantly tried to undo what he did then. His desire to alter the past seems to be an obsession. Worse than that, it is a futile obsession; he has no legal basis for withdrawing his plea or challenging his conviction. More than four years have passed, and it is time to let the past be past. In his plea hearing, Menius said, "I have never done anything so stupid in all my life. Stupid is hardly the word for

it. But that's exactly what it was." If he could return to that attitude, admit that his acts in altering and submitting the checks were wrong, and accept the very light punishment he received four years ago, the Court believes he would be a happier man and could contribute much to his church and community.

Menius' guilt of the offense charged and his delay in submitting his Rule 32(d) motion require the denial of that motion. Moreover, the record shows that he knew the direct consequences of his plea; his counsel did not coerce his plea; there is no evidence of an actual conflict of interest which adversely affected his case; and his lawyers competently handled his case.

Based on the foregoing, it is recommended that an order be issued denying defendant's motions to withdraw his plea under Rule 32(d) or for a writ of error coram nobis.

s/Herman Amasa Smith
United States Magistrate

19 January 1981

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

UNITED STATES OF AMERICA)
)
v.) Cr-76-104-01-G
)
RICHARD B. MENIUS)

RESPONSE TO
MAGISTRATE'S FINDINGS AND RECOMMENDATIONS

Richard B. Menius, defendant, was convicted on a plea of guilty of violating 18 U.S.C. 1001 on April 20, 1976. He was fined $2,000.00 and has paid that fine.

The defendant filed a motion May 13, 1980 together with brief, affidavit and a supplemental affidavit dated September 10, 1980 requesting the court to grant relief from the Judgment of conviction and permitting withdrawal of the plea in accordance with Rule 32(d) of the Rules of Criminal Procedure; or, in the alternative, moves the court to grant a Writ of Error Coram Nobis.

An evidentiary hearing on the above motion was held on January 8, 1981.

The defendant, Richard B. Menius, objects

to the proposed findings and recommendations of the Magistrate as filed on Jan. 20, 1981.

1. The defendant moves the Court to disregard the government response for failure to comply with Local Rule 21, and that the motion be considered and decided as an uncontested motion.

2. A transcript of the January 8, 1981 hearing is not yet available. The defendant believes there are facts important to the case not understood or considered by the Magistrate and urges that the transcript be made available for review and further consideration.

3. The defendant, at the evidentiary hearing January 8, 1981 was trying to answer questions from the Court and from the United States Attorney at the same time. A spectator at the hearing has since told the defendant that the questions were conflicting and defendant was obviously frustrated in answering to the extent that it could have prejudiced the Court and created a remark in the footnote, page 14 of the Magistrate's findings.

4. The defendant (Exhibit 13 of affidavit dated September 10, 1980) has constantly pursued honest and legal ways to get relief through employment and to correct the injustice of conviction. The defendant is willing to waive certain rights applicable to the statute of limitations as set forth in paragraph 10 of the motion dated March 28, 1980.

5. The passage of four years before filing a motion does not bar the movant because of lack of reasonable diligence in pressing the claim. In Heflin v. United States, 358 U.S. 415 (1959), the concurring opinion noted:

> The statute (28 U.S.C. § 2255) further provides: "A motion - - may be made at any time." This - - - simply means that, as in habeas corpus, there is no statute limitations, no res judicata, and that the doctrine of laches is inapplicable. 358 U.S. at 420.

McKinney v. United States, 208 F.2d 844 (D.C. Cir. 1953) reversed the district court's dismissal of a § 2255 motion for being too late, the court stating:

> McKinney's present application for relief comes late in the day: he has served some fifteen years in prison. But tardiness is irrevelant where a constitutional issue is raised and

where the prisoner is still confined. 208 F.2d at 846, 847.

In accord, see: Juelich v. United States, 300 F.2d 381, 383 (5th Cir. 1962): Conners v. United States, 431 F.2d 1207, 1208 (9th Cir. 1970); Sturrup v. United States, 218 F.Supp. 279, 281 (E.D.N.Car. 1963) and Banks v. United States, 319 F.Supp. 649 (S.D.N.Y. 1970).

It has also been held that delay in filing a § 2255 motion does not bar the movant because of lack of reasonable diligence in pressing the claim.

The statute (28 U.S.C. § 2255), when it states that the motion may be made at any time, excludes the addition of a showing of diligence in delayed filings. A number of courts have considered contentions similar to those made here and have concluded that there are no time limitations. This result excludes the requirement of diligence which is in reality a time limitation.
Haier v. United States, 334 F.2d 441, 442 (10th Cir. 1964)

6. The Magistrate's findings overlook the fact that the audit of defendant's 1972 tax return was never completed. (Magistrate's findings, p.4). Efforts by defendant to meet with auditor Blake between February 22, 1974 and March 25, 1974 were unsuccessful; once she was away on her honeymoon, having married a special agent in the Intelligence Division of the I.R.S. On at least two occasions she told defendant

that she had not reviewed with Goodwill Industries receipts she had kept and that she would call defendant for a meeting as soon as she could do so. There is no doubt that had the audit ever been finished the checks would have been discovered and explained.

7. Coercion (Dictionary: To restrain or constrain by force or authority: constrain to obedience or submission by forcible means; force or compel, as to do something:)

(a) There is no question that from January 30, 1976 threats, intimidating remarks were made to keep defendant under control, to keep defendant from getting possession of all revelant file papers, to keep defendant from seeing other attorneys. The defendant respectfully requests the Court to review all these facts as set forth in defendant's affidavits of March 28, 1980 and September 10, 1980.

(b) Mr. Rice under oath at the

evidentiary hearing admitted that he refused to let defendant bring in other attorneys in Washington who were defendant's friends, but now claims he wanted to save defendant some money. (A preposterous story when defendant's reputation, job and future were at stake).

(c) Mr. Rice remembered under oath at the hearing of handing defendant a 12 pound package containing two copies of all papers in counsel's file when reminded by Mr. Greason that he (Mr. Greason) had asked be given to defendant. This is the material defendant had been begging Mr. Greason for. (Page 16, defendant's supplemental affidavit), Mr. Rice's affidavit, paragraph 4, page 2 confirms that Mr. Greason left on vacation Friday, April 16, 1976. The copies of file documents had to be available for defendant that Friday and intentionally withheld from defendant, since everything was closed that Easter weekend and Easter Monday except Government offices.

8. The defendant states that many

allegations in the Magistrate's findings are based on parts of affidavits and testimony that are taken out of context.

(a) The Magistrate's findings, page 16, claims defendant has not responded to affidavit of Mr. Rice, p.4; affidavit of Mr. Greason, pp 9-10. The defendant did respond to this subject in affidavit dated September 20, 1980 referring only to Mr. Greason's affidavit. The question of extent of participation in suits against Wachovia is mute. However, their responsibility as general counsel is more fully explained as follows:

(b) The defendant as a senior management officer of Wachovia for many years was quite aware of the responsibility of every employee, as well as Wachovia's in-house legal counsel and outside counsel to maintain a good public image and to avoid any bad publicity. The Wachovia organization had been in the news in an unfavorable way over several years; a merger with the Bank of Granite, Granite Falls, N. C.; a de novo branch in

Hickory, merger with the American Credit Company in Charlotte, the Class Action Suit, the employment of a former high Wachovia officer by a bank in need of professional help that Wachovia had to give in to the F.D.I.C. and regulatory Government Agencies to permit employment. Whether general counsel was actively representing Wachovia directly in any of those cases, they as retained counsel had a responsibility to protect Wachovia's public image.

(c) It makes common sense to avoid publicity of a public trial when a plea of guilty away off in Wilkesboro with little or no publicity would be to Wachovia's advantage. It makes common sense that if defendant could be enticed, threatened, restrained from getting other attorneys, save some of defendant's retirement and compel defendant to go before Judge Warlick (according to Mr. Greason, a Judge who hated the IRS) Wachovia would benefit by avoiding adverse trial publicity.

9. The Magistrate's findings, page 18, state the lawyers denied telling Wachovia officials until after March 15, 1976. The defendant called attention to the court, page 4, of Mr. Rice's affidavit: "Wachovia's attitude throughout our representation of defendant Menius - - - . Could it be possible that March 16, 1976 to April 21, 1976 (5 weeks) means "throughout our representation"? Mr. White, at the evidentiary hearing, emphasized that Wachovia management should have known of the I.R.S. investigation. The defendant agreed and repeatedly urged counsel that defendant notify employer. Mr. White may remember, or the U. S. Attorney's files may have a record of Wachovia management being kept informed. The defendant on March 1, 1976 in an effort to reach Mr. Tilley by phone reached Mr. White instead. Mr. White knew of defendant's case at that time at least by name and told defendant when to call back to reach Mr. Tilley.

(a) The defendant was convinced at the evidentiary hearing that enough evidence was

presented to give the Court proof that defendant's employer had been kept informed throughout the investigation, a complete Breach of Confidence. The Magistrate's findings suggest a conclusion that no breach of confidence adversely affected the case by defendant's lawyers informing the bank. Yet, the Magistrate's findings suggest that Wachovia knew more about the case than defendant told them. This infers that the bank knew more about defendant's case then and now than defendant. The only place Wachovia could get such information was from defendant's counsel. More important, this would explain Mr. Watlington's refusal to reinstate defendant's employment with F.D.I.C. approval (which had been assured to defendant by F.D.I.C. with a request from Wachovia) but rather compared defendant's conviction as greater than that of board member John Akers, who had been convicted of income tax evasion (defendant's affidavit September 10, 1980, p.3).

Further, it explains a prejudice on the part of the bank to assist an employee of 36 years to obtain much needed employment.

10. The Magistrate's findings on incompetence have been covered in defendant's affidavits. The defendant respectfully asks that any legal mind of the Court ask themselves that even if they were accused of committing a similar act, would they employ this representation as competent for themselves?

11. Attorneys (16) that have discussed this case with defendant have almost without exception, and without knowing the facts, made it clear that any attorney would know there was a conflict of interest.

12. Remarks referred to in the Magistrate's findings page 20 of "I have never done anything so stupid in all my life - - - are the exact words Mr. Greason instructed defendant on April 16, 1976 to say if the Judge should ask defendant for any remarks.

13. The Magistrate's findings p. 20 calls attention to defendant trying incessantly

to undo the swearing to something not true on January 20, 1976. The defendant agrees and hereby further states that there is an insatiable desire or obsession if that is what the government calls it, to find and explore every legal and honest way to make known the truth responsible for the guilty plea in an effort to find employment and financial means to support defendant's family and again be a helpful member of society.

14. The U. S. Attorney's response (page 9) emphasized, and the Court emphasized at the evidentiary hearing January 8, 1981, the good reputation of the law firm of Womble, Carlyle, Sandridge and Rice and the respect that the Court and legal community have for Mr. Rice and Mr. Greason. Mr. Ben White, Assistant U. S. Attorney made this clear when on September 10, 1980 defendant and wife delivered a copy of supplemental affidavit of even date. Mr. White said to defendant: " - - -

You have caused me a lot of trouble - - -, I have no sympathy - - - -." The defendant hastens to tell the Court that he has been both a business and personal fried of a number of attorneys in the firm since 1953 and has always, and still do consider the firm as well as Mr. Rice and Mr. Greason highly respected.

15. The defendant realized that the Court has no knowledge of the reputation of the defendant. The Wachovia organization has had a good reputation second to none in the banking profession. The defendant for nineteen years was personally responsible for creating a good image by directing and maintaining programs and policy relating to service and relationships with all banks nationwide.

16. Defendant and defendant's family have suffered and continue to suffer from the consequences of conviction. The resulting penalty has and continues to create a great miscarriage of justice.

17. Mr. Leon Rice, Mr. Murray Greason and God know that defendant is telling the truth in his affidavits of March 28, 1980 and September 10, 1 980. The defendant is compelled, since his every word and act must rightfully be questioned by the Court, to use every honest and truthful means to prove the facts revelant to defendant's pleadings.

18. Therefore, this response is submitted in the form of an affidavit.

19. The defendant voluntarily took a polygraph examination on January 6, 1981 (Exhibit 1).

The following revelant questions were used in this examination.

1. Were you coerced into pleading guilty at your trial in April, 1976.

   Answer Yes

2. Did you deliberately make any false statements in your affidavits dated March 28, 1980 and September 10, 1980.

   Answer No

3. Were your efforts to fire attorneys resisted by Mr. Greason and Mr. Dorsett.

   Answer Yes

It is the opinion of the polygraphist, based upon the polygraph examination of Mr. Menius, that he was telling the truth when he answered revelant questions listed in this report.

Respectfully submitted,

s/R. E. Marshall
Polygraphist

20. The defendant believes that more than sufficient evidence is shown proving that:

1. There did exist an actual conflict of interest which adversely affected his case.
2. Counsel did coerce defendant's plea.
3. Counsil did not competently handle defendant's case.
4. Defendant did not know and was never informed of direct consequences of plea.
5. Counsel is guilty of breach of confidence.

21. WHEREFORE, Defendant prays this Court to grant his Motion for Post-Conviction Relief under Rule 32(d), Rules of Criminal Procedure, by setting aside the Judgment of conviction

and permitting the defendant to withdraw his plea, or in the alternative, that this Court issue a Writ of Error *Coram Nobis*.

This 28 day of January, 1981.

VERY RESPECTFULLY,

s/Richard Benard Menius
RICHARD BENARD MENIUS, *pro se*
966 Kenleigh Circle
Winston-Salem, N. C. 27106

APPENDIX F

April	21, 1976	- Trial, Menius, Wilkesboro
	22	Greensboro, Pay $2,000 fine. Tilley told me factor to prosecute was IRS did not believe I had lost airline bag.
	29	Letter to Tilley & IRS with documents from Eastern Air Lines confirming loss of bag.
June	16	Greensboro/saw Tilley, request help with F.D.I.C.
Aug.	16	Call to Blake, IRS, requesting Goodwill receipts.
	17	Saw Judge Gordon reference Court records for F.D.I.C.
Sept.	24	Conference, Atty. Don Tepper
	30	Conference, Atty. Don Tepper
Oct.	4	Washington, conference with McCarthy, FDIC. Unable to waive FDIC requirements.
	4.	Wash., conf. Atty. Joe McAndrews.
	12	Talk with Watlington, Wach. Chief Ex., not aware of FDIC ruling on bank holding companies.
	18	Charlotte, Conf. Atty. Tepper.
	20	Char., conf./Atty. Blackford & Tepper. Suggest go before 4th Cir. Court of Appeals/basis involuntary plea and conflict of int. Fee $3,500 - 10,000.

Dec.	21	Conf/ w Tilley request help under Rule 32(d)
	31	Call Atty, Calder Womble, learned he had conferred w/Wachovia in-house legal counsel const. during period of IRS investigation.
May	2, 1977	Greensb/Conf/w/IRS request opportunity clear up quest. leading to prosecution.
Aug.	16	Call from IRS Chief of Crim. Div. inform me their legal counsel could initiate no action.
Oct.	17	Letters to Pagani & Michaux
Nov.	10	Letter from Michaux
Dec.	12	Letter to Judge Gordon
Jan.	4,1978	Letter from Judge Gordon
Jan-Feb	1978	Conferences w/law instrs. Wake Forest U.,Case consid. for law school proj., then considered unwise because of school relationship w/my law firm during invest.
Feb.	24	Conf/w Atty. Drum
	28	Conf/w Drum
Mar.	8	Conf/w Drum-personal tax problem-unwise to help me.
Mar.	13	Appointments w/Pagani, Saw Ryan.
	17	Pres. Carter visits Wake F., Sit beside Michaux.
May	1	Conf/w Michaux

May 11, 1978	Conf/Atty Norman Smith.
Aug 1	Letter from Smith/suggest conflict of interest, suggests other attorneys.
	Conf/w letter/w Michaux.
17	Conf/Atty Allen Bailey,$100. Offer to testify conf. of int. Suggest motion be given to Michaux as he might take action.
23	Call Michaux on Bailey's adv., Michaux declined look at motion.
29	Conf/Atty Don Billings, obvious conflict of interest.
Sep 11	Letter from Billings, suggest other attorneys.
21	Conf/w.Atty Allen Bailey.
Oct 4	Conf/w/Bailey. Paid $1,000. to review tax material & talk to Michaux and IRS urging action based on possible job w/Nat'l. Savings & Trust, Washington.
Dec 18	Letter to Atty Bailey asking for report & advice.
Jan 8, 1979	Call Atty Bailey expressing urgency for action.
Feb 6	Call Bailey - for action.
8	Call Bailey - for action.
20	Call Bailey - for action.
23	Conf/w Bailey.

Feb 27,1979	Letter to Bailey,suggest another approach.
Mar 7	Tele. conf/w/Bailey.
13	Bailey to come to W.S./no show.
21	Conf/w/Bailey-Howard Johnson Motel. Does not want to antagonize law firm or IRS.
27	Washington trip/attempt conf. Justice Dept., left letter.
April 3	Letter to Justice Department.
17	Letter from Justice Dept.
May 2	Call to Justice Dept.
10	Conf/Bailey-$10,000. fee plus expenses before proceeding further.
15	Call to Justice Department.
June 26	Conference IRS,Pagani & Ryan.
29	Conf/w/U.S. Atty. Michaux.
Aug. 6	Call to U. S. Atty. Michaux.
7	Call to I.R.S.,Pagani. Call to Justice Dept.,Yeaman.
13	Call to Atty. Lefkowitz.
16	Call to Lefkowitz.
23	Call from Lefkowitz.
29	Conf/Lefkowitz.
Sept 12	Conf/Lefkowitz.

Sept	12,1979	Conf/Lefkowitz.
	18	Conf/Lefkowitz.
	26	Conf/Lefkowitz.
Oct	11	Conf/Lefkowitz.
Nov	13,1979	Call to Lefkowitz.
Dec	4	Call from Lefkowitz.
	27	Call from Lefkowitz.
Jan	4,1980	Conf/Lefkowitz.
Feb	20	Conf/Lefkowitz - Motion, Brief & affidavits received.
Mar	11	Call Lefkowitz,reviewed motion.
	28	Delivered copy of motion to IRS, Pagani.
Apr	9	Notified Wachovia Management of plans to file motion.
	11	Notified Justice Dept.,Yeaman & Law firm of Rice & Greason of plans to file motion.
May	13	Motion filed.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

UNITED STATES OF AMERICA)
)
v.) Cr-76-104-01-G
)
RICHARD B. MENIUS)

MOTION FOR REHEARING FOR POST CONVICTION RELIEF UNDER RULE 32(d) OF THE RULES OF CRIMINAL PROCEDURE, OR IN THE ALTERNATIVE, MOTION FOR WRIT OF ERROR CORAM NOBIS.

The defendant, on advice from attorneys, attended the January 8, 1981 evidentiary hearing before Magistrate Smith pro se and without calling witnesses since this motion was a civil case and there would be a final hearing that defendant could call witnesses if the motion was denied.

Defendant today, March 9, 1981, finds after being away from home a week that today is the last day to file an appeal or document of record since the case is treated by the court as a criminal case.

Defendant hereby requests that the court permit a hearing of the case and that the following witnesses be called

to testify and tape recordings are available to prove statements attributed to them:

1. Calder Womble, Attorney who told defendant on December 31, 1976 that he kept Wachovia Bank & Trust Company (defendant's employer) informed through Wachovia's in-house legal counsel, James K. Dorsett, of progress and details during 2 years of investigation of defendant by I.R.S.

2. James K. Dorsett, Wachovia's in-house legal counsel on two occasions, July 31, 1976 and March 16, 1978 told defendant that he knew nothing of defendant's situation with the I.R.S. until March 15, 1976.

3. James K. Smith, former auditor with I.R.S. in Greensboro and employed there during start of efforts to prosecute defendant. Statements will show that I.R.S. had been plagued by false and altered documents supporting deductions for small amounts and the auditing section of the

I.R.S. prevailed on the Intelligence Section to take defendant's return and two others (two black employees of the school systems in Winston-Salem alledged guilty of altering documents and receipts for several years). These cases were test cases and efforts were to get guilty pleas without trial. There are no other publicly announced similar cases for such small amounts before or since defendant's case.

Additional witnesses that defendant desires to call that would confirm defendant's allegations are:

4. John F. Watlington, Chairman, Executive Committee of Wachovia Corporation, Winston-Salem, N. C.

5. Dr. David Burr, Senior Minister, First Presbyterian Church, Winston-Salem, N. C.

6. Mrs. Diane Blake, Auditor, Internal Revenue Service, Greensboro, N. C.

7. Mr. Willard McBride, Attorney, Justice Department, Washington, D. C.

8. Mr. Addison Yeaman, Attorney,

Justice Department, Washington, D. C.

9. Mr. Ed. Baity, Vice-President, Wachovia Bank & Trust Company, Winston-Salem, N. C.

The U. S. Attorney's response dated August 5, 1980 (page 9) and transcript of the hearing on January 8, 1981 refers to the personal knowledge, respect and competence of Mr. Rice and Mr. Greason by the Assistant United States Attorney and by the Magistrate. That knowledge and obvious support by the Court and United States Attorney causes the defendant to claim that he did not receive a fair hearing. This support by the Court and prosecution suggests that a fair hearing can only be held before a jury. Therefore, this motion and appeal is that a hearing be before a jury.

The defendant suffers the continuing disability of this felony conviction. In addition to certain civil liberties such as the right to vote, possess a passport, guns, etc. The defendant suffers legal

consequences of where he can obtain employment. The defendant cannot legally be employed by any government agency, cannot run for public office, etc. The defendant continues in "custody" under this felony conviction.

The defendant respectfully prays that this Court grant this motion for a rehearing which defendant is confident will give additional facts and testimony from witnesses that will prove:

1. There did exist an actual conflict of interest which did adversely affect his case.
2. Counsel did coerce defendant's plea.
3. Counsel did not competently handle defendant's case.
4. Defendant did not know and was never informed of direct consequences of plea.
5. Counsel is guilty of breach of confidence.

Respectfully submitted this 9th day of March, 1981.

s/Richard Benard Menius
RICHARD BENARD MENIUS, pro se.
966 Kenleigh Circle
Winston-Salem, N. C. 27106

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Cr-76-104-01-G
	)	
RICHARD B. MENIUS	)	

O-R-D-E-R

On February 27, 1981, a Judgment was entered by this Court adopting the Magistrate's Findings and Recommendations and denying defendant's motions to withdraw his plea under Rule 32(d), Federal Rules of Criminal Procedure, and for writ of error coram nobis. On March 9, 1981, defendant submitted to the Court a paper writing which is a motion for rehearing by the Court of the defendant's motions.

He has also filed a notice of appeal to the Court of Appeals for the Fourth Circuit. In support of his motion, defendant contends that he did not receive a fair hearing before the Matistrate and requests rehearing before a jury. De-

fendant has offered no law or facts in support of his motion, except defendant's continuing desire to relitigate issues already determined by the Court. Therefore, defendant's motion is hereby DENIED.

s/Hiram H. Ward
United States District Judge

March 25, 1981

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
RICHMOND, VIRGINIA

May 11, 1981

UNITED STATES OF AMERICA)
)
v.) Re: 81-6335
) (Cr-76-104-01-G)
RICHARD BENARD MENIUS)

INFORMAL BRIEF

RICHARD BENARD MENIUS, Defendant herein, pro se, respectfully submits the following points and authorities in support of his Motion for Post-Conviction Relief under Rule 32(d), Federal Rules of Criminal Procedure, or in the alternative, Motion for Writ of Error Coram Nobis.

(1) Did the district Court fail to consider important grounds for relief? If so, what grounds?

The Court failed to consider employer's plans March 17, 1976 to retire defendant (petitioner's Exhibits Nos. 1 & 2) before decision to enter plea of guilty or not guilty on April 6, 1976..

The Court failed to consider secret continuous collaboration between defendant's

counsel and defendant's employer, resulting in; a complete breach of confidence, a resistance to fire attorneys by Mr. Greason and Mr. Dorsett (employer's in-house managing attorney), and coercion to plead guilty by Mr. Rice, Greason and Dorsett. On the contrary, the defendant has a definite impression that the Court and government agreed counsel Rice and Greason were proper in violating their lawyer-client relationship to protect Wachovia Bank from as much publicity as possible.

The Court failed to give due consideration to the term "in custody" as applied in a § 2255 petition.

The Court failed to consider counsel Greason's affidavit stating that "defendant was not accused of a "Tax Crime", etc"; - - "case was handled by counsel in an administrative process".

The Court failed to recognize reasons for Mr. Rice's refusal for defendant to get additional attorneys in Washington, which

he testified was to save defendant additional legal fees.

The Court failed to consider defendant's efforts to get copies of materials in counsel's files to see other attorneys, but Mr. Rice finally admitted under oath that these papers were handed to defendant on the way to trial.

Affidavits dated March 28, 1980 and September 10, 1980 by defendant were not considered in total by the government but rather ignored and little items played up in Magistrate's findings; such as four years before filing motion, etc.

Defendant's motion dated and filed March 9, 1981 for a rehearing is self-explanatory and important for defendant's case but was denied by District Court.

(2) Did the District Court incorrectly decide the facts? If so, what facts?

The Court obviously acquainted with the law firm of Womble, Carlyle and with Mr. Rice and Mr. Greason, placed more credit-ibility in their statements than in the defendant. Mr. Rice obviously was not

telling the truth at the evidentiary hearing. The facts incorrectly decided by the Court were apparent:

1. Counsel did not competently handle defendant's case.
2. There did exist an actual conflict of interest which did adversely affect his case.
3. Counsel did coerce defendant's plea.
4. Defendant did not know and was never informed of direct consequences of plea.
5. Counsel Greason and Mr. Dorset resisted defendant's efforts to fire attorneys and get new attorneys.

The Court placed much emphasis on the passing of four years before filing motion (Magistrate's findings, page 3). Defendant's response to Magistrate's Findings filed January 28, 1981 list a number of cases over-ruling that allegation and decision.

The Court refers to the audit Feb. 6,

1974 and that six weeks went by before special agents called defendant. The Court fails to consider the fact that the audit was never completed. In fact, during the IRS meeting on Feb. 6, 1974 the audit procedure never reached the checks in question but were picked up by the auditor while the defendant was on the phone. The audit was terminated before the checks were considered in the audit and was to be resumed when defendant returned from a trip.

(3) Do you think the District court applied the wrong law? If so, what law do you want applied?

The defendant has word of a former auditor with the Internal Revenue Service in Greensboro (paragraph 3), page 2 of defendant's motion for rehearing dated March 9, 1981) that case was one of extreme selective prosecution, to the extent of being discrimatory. Defendant believes that the Court would consider prosecution and resulting penalties a grave injustice over an isolated case in-

volving $637.00 Tax liability during an illness and would have dismissed the case without prosecution.

(4) Do you feel that there are any other reasons why the District Court's judgment was wrong? If so, what?

The District Court obviously and especially from remarks made in court, has a close personal and professional relationship with the law firm of Womble, Carlyle and placed more credit with their remarks and affidavits even though conflicting and rediculious. The District Court was reluctant to consider the honesty and sincerity of defendant's affidavits and statements and defendant's efforts to prove all the facts. The defendant found it obvious as the transcript of the Jan. 8, 1981 evidentiary hearing will show, that the District Court was more interested in protecting the reputation and integrity of the law firm of Womble, Carlyle than determining justice based on honest basic facts.

(5) What action do you want the Court to take in this case?

The defendant respectfully requests that the Court of Appeals study all of defendant's documents, affidavits, supplemental affidavits, response to Magistrate's findings, transcript of Court proceedings, and motion for rehearing with same interest and vigor as for the Court and government. The defendant believes this action will cause justice to prevail and the court will:

1. Reverse the judgment of the district Court and grant defendant's motion to withdraw the plea. The defendant requests that in so doing that there was such constant communication between counsel and defendant's employer(a complete breach of confidence), that the Court give consideration to directing defendant's employer to reinstate defendant's employment with all back pay and benefits.
2. In the alternate, permit the de-

fendant to appear and/or furnish answers or further proof on any subjects questioned by the Court.

3. In the alternate, vacate the judgment and remand the case for a rehearing.

(6) If you think theCourt should hear oral argument in this case, why do you think so?

The defendant believes an oral argument would be beneficial to explain and answer questions that might adversely influence the Court's opinion. During evidentiary hearing the Court appeared to become obcessed with technicalities rather than a complete overall hearing on all facts, the truth, much of which is just common sense.

s/Richard B. Menius

Copy: United States Attorney
P. O. Box 1858
Greensboro, N. C. 2702

APPENDIX J

UNITED STATES CONSTITUTION
AMMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX K

U. S. CODE § 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

APPENDIX L

U. S. CODE § 3772. Procedure after verdict

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been

waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, - -

APPENDIX M

U. S. CODE, Title 26 Sec. 7207. Fraudulent returns, statements, or other documents.

Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. -

APPENDIX N

U. S. CODE, Title 12, Sec. 1829
Federal Deposit Insurance Act.

Section 19 provides in part:

> "Except with the written consent of the (Federal Deposit Insurance) Corporation, no person shall serve as a director, officer, or employee of an insured bank who has been convicted, or who is hereafter convicted, of any criminal offense involving dishonesty or breach of trust."

APPENDIX O

U. S. CODE, Title 28, § 1254. Court of Appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to a civil or criminal case, before or after rendition of judgment or decree;

APPENDIX P

FEDERAL RULES OF CRIMINAL PROCEDURE, Rule 32

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct a manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

APPENDIX Q

RULES OF THE SUPREME COURT
PART V. JURISDICTION OF WRIT OF CERTIORARI

Rule 17

.1. A review or writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered. - -

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, se ttled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.